

OCT 18 2021

CARNELL HUNNICUTT, SR.
Plaintiff,

MITCHELL R. ELPERS
CLERK

v.

NO. 2:21-cv-00867-JCH-JFR

ALISHA TAFOLA-LUCERO, et.al.
Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANT KEEFE GROUP, LLC'S MOTION TO
DISMISS AND MEMORANDUM IN SUPPORT THEREOF

COMES NOW Pro Se Plaintiff Carnell Hunnicutt, Sr., response
to the Defendant Keefe Group, LLC Motion to Dismiss, states as
follows:

I.

Introduction

Pro Se Plaintiff Carnell Hunnicutt, Sr. is a prisoner housed at the Southern New Mexico Correctional Facility. On December 22, 2020, filed the Complaint on this matter in the First Judicial District Court for the State of New Mexico. Plaintiff repeatedly attempted to the New Mexico Secretary of State Office to serve Keefe Group without success, only to lose \$2500 processing fee never returned (Attachments A) This explains the delay for Defendant Keefe receiving the Complaint in August 2021. Plaintiff's Response to Defendant Keefe Group, LLC's Motion to Dismiss and Memorandum In Support Thereof follows.

Plaintiff brings claims against corrupt state defendants and Keefe/Access, a better known corporate prostitute who solicits contracts from governmental agencies to provide shoddy services, while selling inferior products of their knock-off brands for inflated prices to the prisoner market. These defendant's actions violate state and federal anti-trust laws, including the New Mexico Anti-Trust Act, the Sherman Act, the Clayton Act, and the Robinson-Patman Act. To support his claims Plaintiff

focuses on the fact that he has no other avenue but to purchase food items only from Keefe Group. Although other approved vendors / competitors food items which are cheaper at fair market value are banned due to Keefe Group monopoly on said items. The same applies to Keefe Group Access Secure Pak and Access Correctional Music Services. Because of the monopoly, it enables Keefe Group, a singular entity to corner the market, allows for predatory marketing and pricing practices to be promulgated against the Plaintiff / prisoners. The Plaintiff complains that the defendants entered into a collusive correctional contract that undercuts all competition on the front end to reap large rewards after the contract(s) are awarded by price increases, mark-ups on services / food items, with no competitive choice. This monopoly does not exist without the agreement of a governmental agency acting in collusion with another party. [Doc. 1-2 at ¶ 6]. Plaintiff's facts support his claims that the Defendants are exploiting prisoners / himself by charging exorbitant prices that exceed fair market value with no competition choice(s). [Doc. 1-2 at ¶¶ 16, 23-24].

II. LEGAL STANDARD

"A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers," but a "broad reading of the plaintiff's complaint does not relieve the plaintiff of the burden of alleging sufficient facts on which a legal claim could be based." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). To survive dismissal under Fed. R. Civ. P. 12(b) 6, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Leverington v. City of Colorado Springs*, 643 F.3d 719, 723 (10th Cir. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

This standard does not require "detail factual allegations," but does require more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). When applying the standard, the Court must "assume the truth of all well-pleaded facts in the complaint, and draw all reasonable inferences therefrom in the most favorable to the plaintiff's." *Leverington*, 643 F.3d at 723 (quoting *Diaz v. City & County of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009)). The plausibility standard is not akin to a 'probability requirement' but... [does] ask [I] for more than a sheer possibility that a defendant acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 556). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is remote and unlikely.'" *Twombly*, 550 U.S. at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). A complaint need only to "raise a right to relief above the speculative level... on the assumption that all [it's] allegations... are true (even if doubtful in fact)." *Id.* at 555 (citation omitted). However, "[w]here a complaint pleads facts that are 'merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

Here, all of Plaintiff's claims are not subject to dismissal for stating claims under the Unfair or Deceptive Acts or Practices and state/federal Anti-Trust Laws against Defendant Keefe.

III. Analysis

Plaintiff's complaint and claims of anti-competitive conduct against Keefe are pretty clear that the monopoly it has on the New Mexico

Correctional Department violates the New Mexico Antitrust Act, Sherman Antitrust Act, Clayton Act, and the Robinson-Patman Act.

A. Plaintiff's claims under the New Mexico Antitrust Act must prevail by statute

Plaintiff's claims pursuant to the New Mexico Antitrust Act (N.M. Stat. Ann. §57-1-3) which states "Contracts for restraint of trade or monopoly void" must prevail as a matter of law because it voids out the contract at issue. Keefe's attorney argument that Section 57-1-16(A) of NMSA 1978 § 57-1-1 is flawed, he states that said section "explicitly authorizes the contract at issue" (to create a monopoly). What 57-1-16 [Lawful activities.] states is: "Nothing contained in the Antitrust Act [57-1-1 to 57-1-17 NMSA 1978] is intended to prohibit actions which are:

A. clearly and expressly authorized by any state agency or regulatory body acting under a clearly articulated and affirmatively expressed state policy to displace competition with regulations; and

B. actively supervised by state agency or regulatory body which is constitutionally or statutorily granted the authority to supervise such actions when the agency or regulatory body does not have any proprietary interest in the action.

The Defendants in this matter think the word 'displace' means monopoly when it doesn't. Section 33-1-17(B) applies to correctional facilities in Guadalupe, Lea and Santa Fe New Mexico, not Dona Ana. Section 57-1-3 of the New Mexico Antitrust Act, 57-1-1 NMSA 1978 applies not merely to contracts that are on their face violative of the Act, but also to facially legal contracts that have the object of violating the antitrust laws; the defense of contract illegality stems from the express provision of the Act. *United Nuclear Corp. v. General Atomic Co.*, 1980-NMSC-094, 96 N.M. 155, 629 P.2d 231, 1980 N.M. Lexis 2727 (N.M. 1980), cert. denied, 451 U.S. 901, 101 S.Ct. 1966, 68 L.Ed.2d 289.

1981 U.S. LEXIS 1637 (U.S. 1981). Section 57-1-3 allows the Plaintiff to sue the Defendants for price fixing. See *California v. ARC America Corp.*, 490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed. 2d 86, 1989 U.S. LEXIS 2024 (U.S. 1989) (Pursuant to this section (57-1-3), indirect purchasers of products that have been subject to price fixing are allowed to sue for all overcharges passed on to them by direct purchasers.) NMSA § 57-1-4 does not exempt the Defendants, and NMSA § 57-1-3 does not bar the Plaintiff from pursuing Keefe under the Antitrust Act involving interstate or foreign commerce.

B. Plaintiff's Federal Antitrust Claims must Prevail and States a Claim that will Prevail

Plaintiff assertion of federal laws being violated that includes, the Sherman Anti-trust Act, Clayton Antitrust Act, and Robinson-Patman Act. The Plaintiff claims that the restraint of trade through the combination, conspiracy, through contract to monopolize violate these federal acts. Plaintiff is not claiming the federal constitution to be provided with retail outlets. Plaintiff claims he's being subjected to unfair or deceptive acts or practices ("UDAP") that is causing substantial injury to himself and consumers which is not reasonably avoidable, and not outweighed by countervailing benefits to consumers or to competition. 15 U.S.C. § 45(c)(2) (2012). Plaintiff have an actionable claim for unfair or unconscionable practices because of his inability to avoid injury; Keefe sells essential goods/services through state created monopolies/monopoly, and employ unfair tactics. Plaintiff have no alternative. As one court found, families who pay exorbitant phone rates do so "out of sheer desperation for contact with their loved ones." *Jamer v. Global*Tel Link*, No. 13-cv-4989, 2018 WL 3727371 at *2 (D.N.J.

Aug. 6, 2018) (opinion re: motion to certify class). Under the UDAP Plaintiff claims are on the frequent facial violations of said statute, in the form of use of monopoly power to extract excessive fees, see *Eng. Ford v. ChartOne, Inc.*, 908 A.2d 72 (D.C. App. 2006) (consumer pleaded a valid claim for unconscionably high prices under the D.C. Consumer Protection Procedures Act, where plaintiff's only way to obtain copies of his own medical records was to pay \$6.36 per page to contractor selected by the medical provider); Plaintiff claim Keefe pays a kickback to the issuer of a government contract that results in exorbitant fees passed on to the Plaintiff, *Stalker v. MBS Direct*, No. 10-11355, 2011 WL 797931, at *6 (E.D. Mich. Mar. 1, 2011) (plaintiff properly stated a claim under the Michigan Consumer Protection Act by alleging that 4-11% commission that book vendor paid to school district unreasonably inflated cost of textbooks sold to students); class cert. denied 2012 WL 6642518 (E.D. Mich. Dec. 20, 2012). Because Keefe is able to use its market power to inflict harm on the Plaintiff/prisoners, its trade practices are potentially subject to a private action under section 4 of the Clayton Act, 15 U.S.C. § 15 (2012), Keefe violates the Robinson-Patman Act through its price discrimination and the Sherman Anti-Trust Act for unreasonable restraint of trade. The Plaintiff and those similarly situated are being injured and continue to be injured by unfair and deceptive acts or practices with no ability to avoid injury by Keefe and its monopoly.

IV. Conclusion

WHEREFORE, for the foregoing reasons, Plaintiff respectfully request this Court go forward with Plaintiff's complaint, and grant other relief as the Court deems just and proper.

Respectfully submitted,

C. H. K. 77910
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CERTIFICATION OF SERVICE

I hereby certify that on this 12th day of October 2021, I submitted a copy of the following via SNMCF institutional mail to:

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